In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-816

POTOMAC ELECTRIC POWER COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-40a) is reported at 606 F. 2d 1324. The opinion of the Benefits Review Board (Pet. App. 41a-44a) is reported at 7 B.R.B.S. 10. The Decision and Order of the administrative law judge (Pet. App. 45a-51a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1979. The petition for a writ of certiorari was filed on November 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals correctly affirmed an award of compensation benefits for an injured knee under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, where the compensation was calculated under the Act's "other cases" provision, 33 U.S.C. 908(c)(21), rather than its schedule provisions for partial loss of use of a leg, 33 U.S.C. 908(c)(2) and (19).

STATEMENT

Respondent Terry M. Cross, Jr. ("claimant") has been employed by petitioner Potomac Electric Power Company continually since 1961. From 1972 until he was injured in 1974 he worked as a Class A cable splicer (Pet. App. 46a). That job is physically demanding, requiring the worker to lift heavy equipment and climb up and down ladders and scaffolding. Only an agile worker in good physical condition can perform the necessary climbing and twisting involved in working on cables in confined areas (*ibid.*).

On December 7, 1974, claimant injured his left knee while working in a manhole (Pet. App. 46a). He filed a claim for benefits under the District of Columbia Workmen's Compensation Act (D.C. Code § 36-501 (1973)), an extension of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* Petitioner and claimant disagreed on the method of computing compensation for permanent partial disability under Section 8(c) of the Act, 33 U.S.C. 908(c), so the matter was referred to the Office of Administrative Law Judges for a formal hearing.

At the hearing, evidence was introduced to show that claimant sustained a 5% to 20% permanent partial disability of his leg (Pet. App. 46a-47a). The administrative law judge found that, although claimant was still paid as a Class A cable splicer after surgery on his knee, he could no longer fully perform all the rigorous work that job entailed and that, as a result of this disability, claimant was denied several salary increases and no longer worked overtime. Using claimant's past earnings as a guide, the administrative law judge computed claimant's compensation rate under the "other cases" provision of Section 8(c)(21) of the Act, 33 U.S.C. 908(c)(21), rather than under the schedule provisions for partial loss of use of a leg, Section 8(c)(2) and (19) of the Act, 33 U.S.C. 908(c)(2) and (19). Under the schedule provisions, claimant would have been entitled to receive a fixed sum equalling a certain percentage of his average weekly wages for a specified number of weeks. The award made under the "other cases" provision took the form of weekly compensation based on the difference between claimant's pre-injury wages and his post-injury wage-earning capacity, without limitation as to the number of weeks.

Petitioner appealed, contending that claimant was limited to a scheduled award under Section 8(c)(2) and (19). The Benefits Review Board affirmed the administrative law judge's decision (Pet. App. 41a-44a), holding that the schedule benefits are not exclusive and that where a claimant can prove a loss in wage-earning capacity greater than the compensation provided by the schedule, he may pursue a claim under Section 8(c)(21). The court of appeals affirmed the Board's decision by a divided vote (Pet. App. 5a-40a).

ARGUMENT

1. Petitioner's primary contention (Pet. 4-5) is that the court of appeals' decision directly conflicts with *Flamm* v. *Hughes*, 329 F. 2d 378 (2d Cir. 1964) (Pet. App. 65a-69a), and *Williams* v. *Donovan*, 234 F. Supp. 135 (E.D. La. 1964), aff'd per curiam, 367 F. 2d 825 (5th Cir. 1966), cert. denied, 386 U.S. 977 (1967) (Pet. App. 53a-64a). In *Flamm*, however, the issue presented to the Second Circuit was whether the Act is unconstitutional because it establishes a schedule of specified benefits only for certain enumerated injuries, with the result that claimants whose injuries do not come within the schedule may in some instances receive less compensation than claimants with less severe disabilities whose injuries are within the schedule.[1] The proposition that the schedule allowances and the "other cases" provision constitute mutually exclusive benefit schemes was not in contention between the parties and was, at most, as the dissenting judge below speculated (Pet. App. 32a), an "unarticulated predicate for Judge Lumbard's opinion for the Second Circuit." But an "unarticulated" assumption that

[1]The claimant in *Flamm* was the widow of a workman whose award under the "other cases" provision was equal to a percentage of his weekly wages for the remainder of his life, as long as the disability remained; the workman's death during the administrative proceedings had resulted in an award smaller than many of the schedule allowances for specific injuries (Pet. App. 69a). The Second Circuit held only that it was not irrational for Congress to compensate enumerated injuries in a manner different from that used "for all other injuries" (*id.* at 68a-69a). That holding is not inconsistent with the view that in some circumstances a person suffering from one of the enumerated injuries might alternatively recover compensation under the "other cases" provision. The claimant in *Flamm* apparently never contended that she was entitled to recover under a specific clause of the statute in lieu of the "other cases" provision.

is unnecessary to the result is hardly a conflict, analysis of an issue, and *Flamm* therefore is not in conflict with the decision below.[2]

Williams v. *Donovan*, *supra*, in which the Fifth Circuit affirmed a district court decision holding that a claimant suffering a permanent partial disability of the knee must receive benefits under the schedule provision rather than the "other cases" provision of the Act, does conflict with the decision in the present case, but it does not represent a recent or reasoned consideration of the issue. The Fifth Circuit's one-paragraph per curiam opinion does not discuss the exclusivity issue, and the district court decision it affirmed was, like the Second Circuit's decision in *Flamm*, written more than 15 years ago.

During those 15 years, as the court below pointed out (Pet. App. 13a), a great many states have abandoned the *Williams* rationale in interpreting state workmen's compensation schemes similar to the Act. Moreover, the Benefits Review Board, which in 1972 replaced the district courts as the initial review tribunal under the Act, has expressly rejected *Williams* in a number of cases involving permanent total disability. See, *e.g.*, *Brandt* v. *Avondale Shipyards, Inc.*, 8 B.R.B.S. 698, BRB No. 77-103 (1978); *Dugger* v. *Jacksonville Shipyards*, 8 B.R.B.S. 552, BRB No. 77-692 (1978), aff'd, 587 F. 2d 197 (5th Cir. 1979) (distinguishing *Williams*).

[2]Indeed, the court of appeals' opinion in *Flamm* is even less apposite to the present case than the discussion in the text suggests. The precise question before the Second Circuit was whether the district court should have sought the convening of a three-judge court to consider the claimant's constitutional challenge to the statute (Pet. App. 68a).

We submit that there is no need for the Court to consider this issue at this time. The issue does not arise in litigation with any frequency, as the paucity of appellate decisions indicates. Furthermore, it is possible that the Fifth Circuit would decline to adhere to its view in *Williams* in light of the intervening decisions of the Benefits Review Board and the District of Columbia Circuit. Petitioner's assertion (Pet. 6) that the opinion below "will undoubtedly burden the administrative bodies and the Courts with much additional litigation" is unsupported speculation, based simply on an assumption that many workers suffering partial impairments will conclude that they can obtain greater benefits by seeking to prove actual earning disability rather than by recovering under the schedule without the necessity of such proof. If that assertion were to prove correct, there will be time enough for this Court to resolve any conflicts that may continue to exist.

2. Contrary to petitioner's contention (Pet. 6), the decision of the court of appeals is in accordance with the law. "Disability" is defined in Section 2(10) of the Act, 33 U.S.C. 902(10), as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Disability is, therefore, an economic as well as a medical concept within the meaning of the Act. *Quick* v. *Martin*, 397 F. 2d 644, 648 (D.C. Cir. 1968).

The schedule allowances in Section 8(c) (1)-(20) of the Act, 33 U.S.C. 908(c)(1)-(20), do not compensate injured employees for "disability." Although Section 8(c) is entitled "Permanent partial disability," the schedule included in the section provides compensation for *impairment*, whether or not it is accompanied by *disability* (loss of wage-earning capacity). It establishes an irreducible minimum number of weeks of compensation for certain serious injuries, whether or not the injuries affect the employee's ability to earn a living.[1] As the court of appeals properly noted (Pet. 11a; emphasis added), "if the injury also renders [an employee's] entire body, as a functioning economic unit, permanently partially *disabled*," he is entitled to compensation for loss of wage-earning capacity under Section 8(c)(21) of the Act, 33 U.S.C. 908(c)(21). The injured employee has then sustained more than just an impairment listed in the schedule, so the injury properly falls within the "other cases" provision.

The District of Columbia Circuit is not alone in its holding that schedules are not intended to limit compensation when a specified injury affects a covered worker in a way that produces a loss of wage-earning capacity that exceeds the schedule allowance. As Professor Larson notes, a number of state courts have recognized the error of the old rule that the schedule allowance is exclusive. 2 A. Larson, *The Law of Workmen's Compensation* § 58.20 (1974). Thus, as one state court has noted (*American Tank and Steel Corp.* v.

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[1] In considering the purpose of schedule allowances in Michigan's workers' compensation statute, the Supreme Court of Michigan concluded:

> [The intent was] to consult broad industrial experience and lay down an irreducible minimum number of weeks allowable for certain common specific losses thus removing the issue from costly and delaying litigation at a time when the workman was most helpless and his need the greatest leaving the question of further disability and compensation to be determined on proofs made at a hearing * * *, having due regard for the nature and extent of the injuries, the then capacities and general condition of the workman, and the kind of job he had before his injury[.]

Van Dorpel v. *Haven-Busch Co.*, 350 Mich. 135, 144, 85 N.W.2d 97, 102 (1957).

Thompson, 90 N.M. 513, 515, 565 P.2d 1030, 1032 (1977)): "If one suffers a scheduled injury which causes a physical impairment but does not create disability, [the schedule] will apply. When the impairment amounts to disability, [the general provisions for total or partial disability] are properly invoked." See also *Republic Steel Corp.* v. *Kimbrell*, 370 So.2d 294 (Ala. Civ. App.), writ denied, 370 So.2d 297 (1979). In the present case, the court of appeals joined these courts in refusing to apply the exclusivity doctrine, which even the dissenting opinion below acknowledges produces questionable results (Pet. App. 16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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